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July 14, 2000

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
(Designated Counter in the
12th Street Lobby (TW-A325))
Washington, D.C. 20554

RE: *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999*
Broadcast Signal Issues
CS Docket No. 00-96

Dear Ms. Salas:

Enclosed please find an original and six (6) copies of COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION to be filed with the Commission in the above-referenced matter. Please file-stamp and return two (2) copies to us.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Andrew G. McBride

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 00-96
Broadcast Signal Issues	)	

To: The Commission

COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

A. Introduction and Summary

The Satellite Broadcasting and Communications Association ("SBCA") hereby submits its comments to the Commission in the above-referenced proceeding. The SBCA is the national trade association that represents all the sectors involved in the delivery of satellite television programming to the home. The SBCA's members include the major program services which supply entertainment, sports, and news for distribution to consumer households via satellite; the direct broadcast satellite ("DBS") companies that are the principal satellite service providers; the manufacturers and distributors of receiving equipment; and the large base of retailers who are the point of sale to the consuming public.

The entities most affected by this Rulemaking are the DBS service providers and the 13 million households they currently serve, as well as the millions more who will subscribe to DBS in the future. In addition, national programming suppliers generally and local television broadcast stations in mid-sized and smaller markets will be

negatively impacted by these carriage requirements. The Commission has been directed by Congress in the 1999 Satellite Home Viewer Improvement Act ("SHVIA") to promulgate certain rules regarding signal carriage. *See* 47 U.S.C. §§ 338(b)(2) & (g). SBCA will, for the most part, leave comment on the major operational issues raised by the NPRM to its member companies, which are in a better position to make known to the Commission their individual needs and views on the critical items raised here.[1]

B. Must-Carry Is An Outmoded And Wasteful Regime

We preface these comments by expressing our strong opposition to any forced-carriage regime on constitutional grounds. The two major providers of high-powered DBS, DIRECTV and Echostar, compete with the market-dominant local cable systems and directly with each other for subscribers. The advent of "streaming video" delivered via the Internet and the entry of local exchange carriers into the market for delivery of video programming has only increased competition and consumer choice. *See generally In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming ("Sixth Annual Report"),* 15 F.C.C. Rcd. 978, ¶¶ 5-16 (Jan. 14,

[1] The SBCA's participation in this rulemaking proceeding does not constitute an endorsement of any provision of the SHVIA or a concession that any provision of that statute is enforceable against satellite carriers. SBCA reserves all its rights, including the right to seek judicial evaluation of the constitutionality of any provision of the SHVIA prior to promulgation of any rules or regulations thereunder. *See, e.g., Reno v. ACLU,* 521 U.S. 844 (1997); *Califano v. Sanders,* 430 U.S. 99, 109 (1997); *Time Warner Entertainment Co. v. United* States, 211 F.3d 1313, 1315 (D.C. Cir. 2000); *Time Warner Entertainment Co. v. FCC,* 93 F.3d 957, 972 (D.C. Cir. 1996); *Able v. United States,* 88 F.3d 1280, 1288-89 (2nd Cir. 1996). The SBCA also reserves the right to submit additional comments addressing the constitutionality of the SHVIA itself or any proposed rules enforcing SHVIA.

2000). Every multichannel video programming distributor ("MVPD") must seek to maximize consumer satisfaction with its programming menu or perish.[2]

Given these market dynamics, "must-carry" regimes actually frustrate consumer preference. Consumers are denied the local, regional, or national programming they truly desire, while system capacity is occupied by duplicative or limited-interest programming mandated by government fiat. Must-carry is a constitutional white elephant that exacts exorbitant First Amendment costs with no tangible public policy gains. Particularly in the form mandated by Section 338 of the SHVIA, and as applied to satellite carriers, the SBCA submits that must-carry violates the First Amendment and the Takings Clause of the Fifth Amendment of the Constitution. In addition, by linking a statutory copyright license to a requirement to engage in certain speech, Congress has exceeded its authority under the Copyright Clause. Thus, the Commission's efforts in this rulemaking, while concededly mandated by statute, will only perpetuate an outdated and wasteful regime that is inconsistent with the otherwise pro-competitive approach the Commission has advocated in the area of video programming delivery.

The Commission has correctly identified some of the major differences between satellite carriers and cable operators in the above-referenced NPRM. In brief, they are differences that are inherent in comparing a national service such as DBS with a local enterprise such as cable, which is subject to local regulation because of its use of local

[2] Indeed, with the advent of digital broadcast signals, local television broadcast stations will themselves become capable of delivering multiple video and other programming services into the home. Moreover, both the number of broadcast stations and their gross advertising revenues continues to grow. *See Sixth Annual Report* ¶ 15. Under these circumstances, local television broadcast stations make an odd candidate for a massive government subsidy at the expense of satellite carriers – the least established players in the MVPD market.

rights-of-way. These differences underscore, however, the myriad complexities that arise when trying to implement comparable rules between national and local services that compete with each other. Underlying that relationship is more than 10 years of legislation enacted by Congress, and supported by Commission rulemakings and administrative decisions, specifically designed to promote competition in the delivery of video programming.[3]

While Congress has demonstrated its intent to promote competition, cable operators have nonetheless enjoyed significant statutory advantages over DBS providers. Chief among them was the statutory copyright license for works contained in local television broadcast programming retransmitted to local markets, which cable operators have enjoyed since 1976. It is only through the SHVIA, enacted in 1999, that satellite carriers received a similar statutory license.[4] In those areas where local-into-local service is now available, consumers have access to a fully-integrated program service delivered by satellite. Previously, if they were not eligible to receive distant network signals via satellite, they had to resort to such measures as retaining basic cable service (whereby cable continued to have access to satellite customers) or installing rooftop antennas in order to receive local broadcast channels.

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[3] Legislation includes the Satellite Home Viewer Act of 1988, which contained the satellite industry's first statutory copyright license for the delivery of broadcast signals; the Satellite Home Viewer Act of 1994, which extended that license; the 1992 Cable Act, which contained program access provisions; the 1996 Telecommunications Act, which contained provisions preempting local zoning and private restrictions on the placement of over-the-air reception devices; and the 1999 Satellite Home Viewer Improvement Act, which authorized the retransmission by satellite carriers of local broadcast signals within their respective Designated Market Areas ("DMA").

[4] As noted above, it is unfortunate that this statutory copyright license in 17 U.S.C. § 122 was conditioned upon an unlimited forced-carriage requirement that is more onerous than that applicable to cable operators.

The delivery of local-into-local service by a national platform such as satellite requires significant channel capacity. In order to be able to satisfy the legislative must-carry requirement of the SHVIA (that all broadcast channels be carried by DBS providers on January 1, 2002 in any market where at least one local channel is being offered) the satellite carriers have been conservative in selecting the markets in which they offer local-into-local service in anticipation of the greater demands for channel capacity that will arise in 2002.

Full must-carry requirements applied to a national distribution platform such as satellite are extremely burdensome and highly wasteful. While today the DBS carriers are offering the local affiliates of the four major national networks[5] in those markets where they are offering local-into-local, a full must-carry regime would require, for example, according to Burrell's Media 2000, the carriage of approximately 24 stations in the Los Angeles DMA and approximately 18 stations in the New York City DMA. Many of these stations have very limited local viewership, but nonetheless will utilize national satellite channel capacity. Others, such as shopping channels, have little true local content and simply replicate programming that is already carried via satellite on a national channel. Such a regime is highly wasteful of scarce spectrum resources and does not serve any legitimate governmental purpose, let alone a compelling or important one.

The net result of the statutory must-carry requirement is two-fold. Anticipating a full must-carry condition in 2002 requires the reservation of a substantial number of channels in order to comply with the rule. Thus, Section 338(a)'s must-carry obligation will actually result in many DBS subscribers in mid-sized and smaller markets being

[5] Widely-viewed independent stations may be carried in certain DMAs.

denied any local television broadcast programming at all. SHVIA's must-carry provision will thus have the perverse effect of discriminating against popular local broadcasting in smaller DMAs in favor of duplicative, limited-interest programming with small viewership in the top 10 or 15 DMAs. The popular and widely viewed network-affiliated local television broadcast station in Norfolk, Virginia or Hartford, Connecticut will never reach the DBS platform because federal law mandates carriage of all 24 television broadcast stations in Los Angeles.[6]

Secondly, SHVIA's must-carry requirement will deny consumers national and regional video programming and new interactive programming services that they desire. The enormous channel capacity occupied by the requirement to carry all television broadcast stations in every market served will require satellite carriers to drop (or decline to expand) their offering of specialty channels geared to particular markets or communities. In addition, satellite carriers' offering of interactive programming, such as Internet access, which presents a potential competitor to cable modem and DSL service, could be severely hobbled by the enormous bandwidth constraints created by SHVIA's must-carry provision.[7]

Most of these unconstitutional (and illogical) effects are inherent in the statute itself and cannot be altered by the Commission's action in this rulemaking. *See Califano*

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[6] Congress itself is deeply concerned about this issue. It presently has under consideration H.R. 3615, the Rural Local Broadcast Signal Act, and S. 2097, the Rural Television Bill, both of which are designed to encourage television distribution technologies to provide local-into-local service to the medium, small, and rural television markets where local-into-local service from the DBS carriers may not be available.

[7] Even the advent of new technologies, such as "spot beam" satellites, will not alleviate these burdens. Spot beam satellites will simply "regionalize" the severe capacity problems created by SHVIA's must-carry obligations.

v. Sanders, 430 U.S. 99, 109 (1997). *Accord United States v. Bozarov,* 974 F.2d 1037, 1040 (9th Cir. 1992) ("[A]n agency has no authority to declare its governing statute unconstitutional."). The Commission does have discretion is setting rules regarding duplication as between local commercial television broadcast stations in a particular market. *See* 47 U.S.C. § 338(c)(1). The Commission also possesses discretion to offer relief from duplication in the case of noncommerical television broadcast stations. *Id.* § 338(c)(2). While the exercise of this discretion cannot eliminate the unconstitutional effects of SHVIA's must-carry requirement, we urge the Commission to exercise its discretion in these areas to minimize the unconstitutional burdens placed upon satellite carriers by Section 338(a).

C. Requiring Carriage Of Both Digital And Analog Signals Raises Major Competitive Issues And Does Not Serve Consumers

The Commission asks specifically in this NPRM whether satellite carriers should be required to carry both the digital and analog signals of local broadcasters in the markets where they offer local-into-local service until the period of conversion to full digital broadcasting is complete. There is no basis in the SHVIA for requiring the dual carriage of broadcast signals. Moreover, directing such carriage on the part of the DBS carriers will have a significant negative impact on the ability of the industry to compete in the video marketplace and on consumers who have chosen, or will choose, DBS as a competitive alternative to cable. This step is not authorized by statute and will only increase exponentially the unconstitutional burdens on satellite carriers imposed by SHVIA's must-carry obligation.

The dual carriage of local broadcast signals would only serve to defeat the policies of promoting competition among MVPDs that Congress and the Commission

have so carefully crafted and that are now bearing fruit. It would be far wiser for the Commission to wait until the path to the digital broadcast environment has become clearer so that the marketplace entities which will be involved in shaping how and under what conditions digital programming will be distributed to consumers – satellite carriers, cable operators, and consumer electronics manufacturers – have had an adequate opportunity to sort out the most effective marketplace mechanisms, and the challenges they pose, for serving those consumers.

The advent of digital television broadcasting, concurrent with a dual must-carry obligation, would have a drastic effect on satellite carriers and consumers. Channel capacity usage simply for the delivery of local-into-local would be dramatically increased. In fact, depending on how broadcasters are permitted to use the additional spectrum granted by Congress, the incremental need for even more satellite capacity would entail the elimination of a substantial number of channels that would ordinarily be used to satisfy the programming desires of the millions of consumers who have selected DBS service as their choice for receiving news, sports, and entertainment programming. In essence, satellite carriers would be reduced to mere delivery agents for broadcast television at the expense of DBS consumers and national programming suppliers. Furthermore, requiring dual carriage indefinitely – while the timetable for the complete conversion of all broadcast signals to digital and the ultimate abandonment of analog signals are both still unsettled – would create sheer chaos for satellite carriers.

The Commission must not countenance the marketplace vagaries that a dual must-carry regime would engender. The enormous absorption of channel capacity resulting from such a requirement would stymie video competition as satellite carriers either

reduced the number of non-broadcast channels available to consumers, or elected to reduce the number of markets served with local-into-local, or even eliminated local-into-local service entirely. The result would be the exact opposite of what both Congress and the Commission intended. Marketplace competition would be sacrificed because of an ill-conceived must-carry scheme that placed the interests of broadcasters ahead of competition and the interests of consumers. The local-into-local license authority that was originally conceived to help satellite carriers compete on a more equal footing with the cable industry and bring consumers real choice in the video marketplace would, instead, become an impossible burden should the Commission mandate the carriage of local broadcasters' analog and digital transmissions.

1. Dual Carriage Does Not Meet The Constitutional Standards Governing The Permitted Regulation Of Free Speech

We have already stated our view that SHVIA's must-carry requirement does not pass constitutional muster. This is an issue the federal courts must resolve in the first instance. Any decision by the Commission to dictate dual carriage will substantially exacerbate the First Amendment and Takings Clause violations worked by SHVIA's must-carry requirement. The Supreme Court's decisions in *Turner I*[8] and *Turner II*[9] cannot justify the massive and unlimited occupation of the DBS platform that would be worked by adoption of a dual carriage regime. The carriage of local broadcast stations, where channel capacity permits, is of utmost competitive importance to the satellite carriers. Prior to the local-into-local authority granted by the SHVIA, the only network programming eligible for distribution by satellite carriers were the distant network signals

[8] *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994).

[9] *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997).

permitted under the 1988 SHVA – and then only to households which could not receive a Grade B intensity signal with a conventional rooftop antenna. That regime was fatally flawed from the very beginning, and for more than ten years satellite carriers competed with cable operators without the ability to offer like broadcast programming to consumers. Ironically, even with the advent of local-into-local retransmission authority, the distant network signal regulatory scheme remains as unworkable as ever, evidenced by the continuing Commission rulemakings and studies mandated by Congress that are in progress today.

A Commission decision to require satellite carriage of both analog and digital signals of the same local broadcast station would not survive scrutiny in the federal courts. First, it would exceed the statutory authority granted the Commission by Congress. Secondly, it would exacerbate the constitutional violations already worked by SHVIA's must-carry regime.

SHVIA's must-carry requirement is fatally flawed under the First Amendment. While we believe that a court would be bound to subject SHVIA's must-carry requirement to the strictest standard of First Amendment scrutiny, SHVIA cannot satisfy even the relaxed "intermediate" standard of review invoked by the Court in the two *Turner* cases. There is no evidence that satellite carriers (who are neither monopolists nor substantially vertically integrated with programming suppliers) are exercising their editorial discretion to vindicate anything other than consumer preference. Absent strong evidence of market breakdown, the government simply cannot dictate market outcomes in the world of ideas. Moreover, unlike cable must-carry, the SHVIA carriage requirements are unlimited – both in the aggregate and in any particular DMA. *Compare*

47 U.S.C. § 534(b)(1)(B) (placing overall limits on cable operators' must-carry obligations based on total activated channels), *with* 47 U.S.C. § 338(a) (placing no limits on total must-carry burden). Congress gave no reason for imposing more onerous local broadcast carriage requirements on satellite carriers, and none in fact exists. All these factors demonstrate that SHVIA must-carry is itself severely constitutionally flawed; adopting a dual must-carry regime would only serve to exacerbate each one of these constitutional flaws.

2. The Commission Must Let The Marketplace Resolve Digital Carriage As Well As Other Consumer Issues Associated With Digital Television

No salient public policy, economic interest, or consumer benefit or convenience is implicated or affected by dual carriage. In the context of the development of the digital television marketplace analog signals will, as a practical matter, always be available for viewing by consumers until such time as consumers have the means to watch digital signals. Accordingly, even if analog must-carry, standing alone, could pass constitutional muster (a view the SBCA does not accept), there is no compelling or important interest in mandating a dual must-carry regime. It is simply an unauthorized wealth transfer from satellite carriers to local broadcasters.

Furthermore, even assuming *arguendo* that some compelling or important governmental interest exists, it will continue to be served by the carriage of analog signals by the satellite carriers up to the time that all local broadcasters begin to transmit digital signals. A requirement to carry both digital and analog signals has no finality because it opens the very real possibility that some broadcasters may not meet the 2006 deadline for conversion to full digital and may not return the 6 MHz being used for

analog transmission to the Commission. In the meantime, satellite channel capacity would be overburdened and consumers increasingly dissatisfied by the subsequent reduction in non-broadcast programming that would surely occur. It would be unreasonable and irresponsible for the Commission to enforce dual carriage under such conditions, especially, as we have pointed out, in view of the uncertainties that pervade the broadcasters' transition.

The marketplace has already begun the process of creating a complete digital environment as it relates both to the transmission and reception of all types of television programming, and to the needs of consumers in displaying that programming. For example, DBS providers are working with consumer electronics manufacturers to develop the specifications for interfaces between DBS set-top boxes and consumer electronics equipment that include copy protection. If there is the potential for consumer harm during the transition period, it will be because some broadcasters will be lax in making the conversion, thus leaving consumers to fend for themselves. Satellite carriers are prepared to bring digital programming to consumers, and more benefits of digital compression technology will be offered in the marketplace later this year. The price for participating in the digital revolution, however, must not be the application of rules, such as dual must-carry, which serve only broadcasters at the expense of consumers.

D. Conclusion

The SBCA is of the view that the SHVIA's must-carry provisions violate the First Amendment, the Takings Clause of the Fifth Amendment, and exceed Congress' authority under the Copyright Clause of the United States Constitution. The SBCA reserves all its rights, including the right to challenge the SHVIA in federal court. While

the Commission cannot rewrite the statute, and does not have the authority to pass on its constitutionality, the Commission can and should interpret the must-carry provisions narrowly in order to avoid exacerbating the unconstitutional burdens imposed on satellite carriers by Section 338. In particular, the Commission should reject any attempts to expand SHVIA's must-carry obligation to include both digital and analog signals. Such a requirement has not been authorized by Congress and would result in massive occupation of the DBS platform to the detriment of satellite carriers, programming suppliers, and consumers.

Dated: July 14, 2000

Respectfully submitted,

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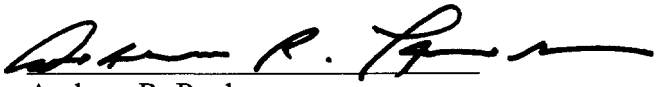

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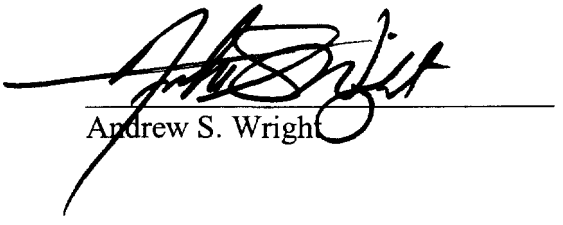

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